IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-64

Matter of Accounting of ABRAHAM D. LEVY, As Administrator of the Estate of CHARLES W. BROWN,
Deceased,

STATE OF NEW YORK,
Appellant-Respondent,

UNITED STATES OF AMERICA,
Appellee-Petitioner.

ANSWERING BRIEF OF THE STATE OF NEW YORK IN OPPOSITION TO THE MOTION OF THE UNITED STATES TO AFFIRM

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellant-Respondent
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7487

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

IRWIN M. STRUM
Assistant Attorney General
In Charge of Trusts and Estates Bureau

ALLAN E. KIRSTEIN
Assistant Attorney General
Of Counsel

IRVING ATKINS
Senior Attorney
New York State Tax Commission

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-64

Matter of Accounting of ABRAHAM D. LEVY, As Administrator of the Estate of CHARLES W. BROWN,

Deceased,

STATE OF NEW YORK,

Appellant-Respondent,

UNITED STATES OF AMERICA,

Appellee-Petitioner.

ANSWERING BRIEF OF THE STATE OF NEW YORK IN OPPOSITION TO THE MOTION OF THE UNITED STATES TO AFFIRM

Statement

This brief is submitted by the State of New York in opposition to the motion of the United States of America pursuant to Rule 16(1)(c) of this Court to affirm "the judgment of the district court."

The facts summarized by the United States are essentially correct as stated with one exception. It is alleged (Motion 1-2) that the decedent, Charles Brown was admitted to the Veteran's Administration Hospital in Bronx, New York and died at the hospital on March 5, 1973. In fact, those dates are correct, but Mr. Brown did not continuously stay at the hospital. On November 17, 1972 he was dis-

charged and on March 1, 1973, a few days before his death he reentered the hospital.*

Argument

In challenging the constitutionality of this statute, the State of New York believes that the rationale underlying 38 U.S.C. 5220 is founded on an implied contractual arrangement between the decedent and the United States which is inapplicable to this decedent. Ordinarily, a decedent is entitled to free hospital care at a VA facility in return for the "consideration" that if the deceased veteran dies intestate without heirs, any property of the decedent not otherwise disposed of shall pass to the United States. In the case at bar, the decedent was over the age of 65 and thus entitled to free medical care at a VA hospital under the provisions of another statute, i.e. 38 U.S.C. 610(a)4.

In a recent Internal Revenue Service Revenue Ruling, Rev. Rul. 78-14, IRB 1978-2 p. 16, the United States appears to acknowledge that 38 U.S.C. 5220 is underpinned by a contractual theory. In this ruling, a deceased veteran died intestate without heirs in a VA hospital. Rather than proceeding under 5220, the United States chose to apply a slightly different statute, 38 U.S.C. 3202(e). This statute provides that assets of the decedent derived from VA funds which would otherwise escheat to the State of decedent's residence shall instead escheat to the United States.

Since the decedent left property which was derived from VA benefits, unlike Mr. Brown, the United States could have applied either 3202(e) or 5220. Revenue Ruling 78-14 explains the reason for selecting 3202e rather than 5220:

"Unlike the statutes (38 U.S.C. sections 5220-5221)

* Application for Readmission, Doc. 8, Ex. 1, Rec. on App. The decedent never signed this document which contains footnoted language of bequest.

considered in Rev. Rul. 75-533 and Rev. Rul. 76-542, the statute under consideration does not employ any contractual language as an alternate basis for its operation.

• • •

"Thus, the obligation to return to the United States the value of funds held by a fiduciary under 38 U.S.C. Section 3202(e) is imposed solely by law without any *requirement of a contract or agreement* . . ." (emphasis supplied)

Therefore, even the United States recognizes that 38 U.S.C. 5220 was enacted to prevent a decedent from receiving free medical care to which he was not otherwise entitled from the United States and then having the decedent's property escheat to his state of residence. Furthermore, although the provisions of 5220 appeared to be squarely met, the United States chose to apply 3202(e), rather than face the problem of proving the validity of the implied contract.

The appellee also contends that New York is precluded from taxing the estate because it must follow the policy of conforming its estate tax law to the federal estate tax law. The tax law of New York does not mandate such a policy. In cases where the federal ruling is clearly erroneous, New York does not have to conform to federal law.*

Appellee maintains as an alternate argument that the property of the decedent escapes tax as a charitable pledge (Motion, p. 5). The State of New York strenuously disagrees. The transfer to the United States cannot by any means be construed as a charitable pledge. The appellee has never even suggested that the decedent was possessed of a donative intent. The United States receives these

* See New York State Tax Law § 961(a)(3). This section provides that a final federal determination is not binding if "such final federal determination is shown to be erroneous."

funds merely through the fortuitous circumstance of the decedent dying at the time he was in a VA hospital. Had the decedent died a few days earlier before he entered the hospital, the United States would have no claim to these funds.

38 U.S.C. 5226 provides that if a rightful claimant to these funds should appear, the United States must pay these funds to him.* Thus, the appellee, according to 38 U.S.C. 5220 and 5221 takes these funds not as the recipient of a charitable pledge or bequest, but as a custodian or trustee.**

Appellee has cited Rev. Rul. 75-533 as its authority for the deduction of the decedent's assets as a charitable pledge. This ruling did not consider the case of a decedent over age 65 entitled to free medical care pursuant to 38 U.S.C. 610 (a)4. Such a factor is crucial since according to the ruling, the charitable pledge is valid only to the extent that adequate and *bona fide* consideration was received.***

The appellee contends that *In Re Estate of O'Brine,* 37 N Y 2d 81, 332 N.E. 2d 326, 371 N.Y.S. 2d 453 (1975) upon which we rely to disallow the deduction of the decedent's assets is inapposite (Motion, pp. 5, 6). A different statute (38 U.S.C. 3202e) is involved in *O'Brine,* but even the Circuit Court of Appeals in the decision below noted that the

---

* See J.S. pp. 8, 16.

** This Court has acknowledged a custodial escheat in *U.S.* v. *Klein,* 303 U.S. 276, 282 (1938) and in *Western Union Co.* v. *Pennsylvania,* 368 U.S. 71, 77, 78 (1961).

*** The IRS has since reconsidered the ruling with Rev. Rul. 76-542 1976-2IRB p. 37, which rejected the charitable pledge deduction because the veteran was an incompetent and therefore unable to enter into a contract. We believe that a similar result would be reached for a veteran over the age of 65 due to a lack of consideration. It should be noted that this Ruling did allow a deduction on the alternate theory of a liability imposed by law which we have discussed at J.S. p. 16.

two statutes are "substantially the same."**** Furthermore, the appellee would have an even stronger argument in conjunction with 38 U.S.C. 3203(e) since the assets of the deceased veteran were derived from benefits received from the United States. Therefore, an additional argument of a reversion of assets exists in *O'Brine* which is absent in this case.

Otherwise, the two statutes are really identical. Even though 38 U.S.C. 5220 used the term "immediately vests" rather than "escheat", funds to which the appellee would not otherwise be entitled pass to it from the estates of deceased veterans. Therefore, 38 U.S.C. 5220 triggers an "escheat" and certainly not a charitable pledge as appellee argues.

Finally, appellee asserts (Motion, f.n. 3) that *United States* v. *Perkins,* 163 U.S. 625 (1896), which we cite to demonstrate that a bequest to the United States is taxable, is not in point because the funds in the case at bar immediately vest in the United States. The appellee has relied on Rev. Rul. 75-533, *idem,* which is based on the charitable pledge theory. Since a charitable pledge is treated in the same manner as a bequest, *Perkins* cannot really be distinguished from this case.

The assets of the decedent should be included in his gross estate. Congressional intent requires that these assets be subjected to New York's estate tax. A reading of 38 U.S.C. 5223, 5224 and 5226 confirms that these assets must pass through the expense of administration, one expense of which is the state estate tax.

The Circuit Court of Appeals erred in not following the law of the State of New York as its highest court would have applied it. The highest Court in New York has ruled that a state estate tax must be paid when a deceased veteran dies intestate and his assets pass to the United States through an application of a federal statute.

**** See J.S., p. 10.

Once included in the decedent's gross estate for tax purposes, no deduction is allowable in the State of New York. The assets do not qualify as a charitable pledge. The alternative theory proposed by the United States is a "liability imposed by law." There was no liability "imposed by law", only a federal escheat. Furthermore, the appellee takes the property of the decedent only as a trustee in a custodial capacity, thus the appellee does not have the unfettered ownership of assets to even consider the aptness of a taxable deduction.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Dated: New York, New York
October 25, 1978

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Appellant-Respondent

Samuel A. Hirshowitz
First Assistant Attorney General

Irwin M. Strum
Assistant Attorney General
In Charge of Trusts and Estates Bureau

Allan E. Kirstein
Assistant Attorney General
Of Counsel

Irving Atkins
Senior Attorney
New York State Tax Commission